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No. 93-1171 (3)

In The

Supreme Court of the United States

October Term, 1993

ROBIN R. MOERMAN,

Petitioner,

v.

STATE OF CALIFORNIA, Director of the Department of Fish and Game of the State of California; and DOES I through IX, inclusive,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal, State Of California, First Appellate District, Division One

BRIEF OF AMICI CURIAE CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION, TRANS TEXAS HERITAGE ASSOCIATION, TEXAS WILDLIFE ASSOCIATION, DAVIS MOUNTAINS TRANS PECOS HERITAGE ASSOCIATION, BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, WESTERN GROWERS ASSOCIATION, AND CALIFORNIA WOOL GROWERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF PETITIONER ROBIN R. MOERMAN

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23 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

IDENTITY AND INTEREST OF AMICI CURIAE 2

SUMMARY OF ARGUMENT 6

REASONS FOR GRANTING THE WRIT 7

ARGUMENT

I. AT THE TIME OF PURCHASE, MR. MOERMAN'S REASONABLE EXPECTATIONS DID NOT CONSIDER THE COSTS ATTRIBUTABLE TO THE SUBSEQUENT PRESENCE OF WILDLIFE 8

II. AMICI URGE THE COURT TO MEASURE THE LEGITIMACY OF CALIFORNIA'S INTEREST IN RELOCATING TULE ELK AT THE EXPENSE OF PROPERTY OWNERS' REASONABLE INVESTMENT BACKED EXPECTATIONS 12

III. CLEARLY ESTABLISHED AND ENFORCEABLE PROPERTY RIGHTS ARE NOT ENVIRONMENTAL OBSTACLES, BUT WILL ALLOW INNOVATIVE MANAGEMENT PROGRAMS TO PROSPER 14

CONCLUSION 18

TABLE OF AUTHORITIES CITED

Page

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980) 7

Armstrong v. United States, 364 U.S. 40 (1960) 13,18

Christy v. Hodel, 857 F.2d 1324 (9th Cir. 1988) 9

Christy v. Lujan, 490 U.S. 1114 (1989) 9

Hughes v. State of Washington,
389 U.S. 290 (1967) 13-14

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 8-9

Lucas v. South Carolina Coastal Council,
505 U.S. ___, 120 L. Ed. 2d 798 (1992) 13

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 7

Penn Central Transportation Co. v. New
York, 438 U.S. 104 (1978) 7

Ruckelshaus v. Monsanto Co. 467 U.S. 986 (1984) 8

Webb's Fabulous Pharmacies, Inc. v.
Beckwith, 449 U.S. 155 (1980) 9

Statutes

California Fish & Game Code § 3951 10-11

Page

Rules

United States Court Rule 10.1(c) 7

Miscellaneous

Anderson, Terry L., Wolves in the Marketplace, Wall Street Journal, Western Edition, August 12, 1992 15

Blood, Tom, Men, Elk, and Wolves, 95-105, in Baden and Leal, The Yellowstone Primer, Pacific Research Institute (1990) 15

Defenders of Wildlife, Building Economic Incentives into the Endangered Species Act (Oct. 1993) 15

Natural Heritage Data Center Network, The Nature Conservancy, Perspectives on Species Imperilment (1993) 17

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Pursuant to Supreme Court Rule 37, California Farm Bureau Federation, California Cattlemen's Association, National Cattlemen's Association, Trans Texas Heritage Association, Texas Wildlife Association, Davis Mountains Trans Pecos Heritage Association, Building Industry Legal Defense Foundation, Western Growers Association, and California Wool Growers Association respectfully submit this brief amici curiae in support of petitioner Robin R. Moerman. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

IDENTITY AND INTEREST OF AMICI CURIAE

California Farm Bureau Federation (Farm Bureau) is a nonprofit, voluntary membership corporation organized under the laws of the State of California for the purpose of fostering agriculture and working to resolve those problems facing the agricultural community. Its members are 53 county farm bureaus through which it represents 80,000 member families in 56 California counties and more than 80% of the commercial farmers in the State of California.

California Cattlemen's Association (CCA) is a nonprofit statewide organization which represents the interests of beef cattle producers in legislative and regulatory affairs. CCA has a membership base of approximately 3,200 ranchers and feedlot operators who operate on nearly 40 million acres of private and public land throughout the state. The livelihoods of CCA's members are dependent upon wise stewardship of vast acreages of open space and the ability to protect livestock and other property from predatory wildlife.

National Cattlemen's Association (NCA) is a nonprofit trade association that represents 230,000 cattlemen and others from all segments of the beef cattle industry. It is affiliated with 46 state cattle associations and 29 national beef breed organizations. NCA is an advocate for advancing the economic, political and social interests of the United States cattle industry, and works to create a positive business environment while assuring customers a safe, affordable, and wholesome beef product.

Trans Texas Heritage Association (TTHA) is a nonprofit, voluntary membership corporation organized under the laws of the State of Texas. TTHA is the only statewide organization in Texas dedicated to the protection of landowners' rights. TTHA members believe that the social and economic growth historically experienced by this country had as a cornerstone the recognition of private property rights. TTHA believes that regulatory efforts and governmental takings of property are now limiting the spectrum of private ownership and leading to a faltering of this nation's economy. TTHA represents approximately 13 million acres of privately owned land.

Texas Wildlife Association (TWA) is a nonprofit corporation established under the laws of the State of Texas by ranchers and biologists interested in the management of white-tailed deer. TWA was organized to serve as an advocate for the benefit of wildlife and for the rights of wildlife managers, landowners, and hunters in educational, scientific, political and regulatory arenas. This voluntary membership organization currently represents over 2,000 members and includes 225 business members. TWA is nationally affiliated with Endangered Species Coordinating Council and is a member of Texas Alliance for Property Rights. TWA, jointly with Texas Parks and Wildlife Department, features habitat management and landowner

recognition as fundamental components of its sponsorship of the Texas Big Game Awards Program.

Davis Mountains Trans Pecos Heritage Association (DMTPHA) is a nonprofit corporation established under the laws of the State of Texas. DMTPHA recognizes that social change is inevitable, but seeks to assure that the future brings only constructive change built upon our heritage of free enterprise, private ownership, and the wise stewardship of natural resources on private lands. DMTPHA strives to foster sound conservation practices, protect the civil rights guaranteed by law and promote the continued economic viability of rural communities.

Building Industry Legal Defense Foundation (BILD Foundation) is a mutual benefit nonprofit corporation established under the laws of State of California to monitor legal developments and participate in litigation affecting the residential construction industry in California. BILD Foundation is a subsidiary of the Building Industry Association of Southern California, Inc. (BIA/SC). BIA/SC is comprised of some 1,700 member firms with more than 85,000 employees engaged in the construction of over 70% of all new homes in Los Angeles, Orange, Riverside, San Bernardino, Ventura, and Imperial Counties annually. BILD Foundation believes that governmental burdens, specifically as applied to its industries, must be fairly imposed, foreseeable and clearly attributable to its activities.

Western Growers Association (WGA) is a nonprofit trade association, which was formed in 1926 for the express purpose of representing the fresh produce industry in California and Arizona. WGA's 2,000 members grow, pack, and ship approximately 85% of the fresh vegetables and 50% of the fresh fruit produced in the two states. WGA's headquarters is in Irvine, California.

California Wool Growers Association (CWGA) is a nonprofit statewide organization which has represented the California sheep industry since 1860 in legislative and regulatory affairs. CWGA, and its 860 members, actively facilitates and resolves issues of importance to California's 3,057 sheep producers. As the representative for the second largest sheep producing state, CWGA endeavors to educate, promote, and endorse sound management practices for livestock, wildlife, and multiple use on public lands, and advocates protection of private property rights.

Amici respectfully urge this Court to consider that while privately owned agricultural properties freely provide the public with many environmental amenities, including open space, wildlife habitat, and recreational opportunity, such properties are carefully managed to fulfill investment backed expectations. Still, because strong public sentiments desire to return as much property as possible to a state of nature, uncompensated burdens are increasingly placed upon privately owned properties which destroy the value of those expectations.

Such burdens in part result from the public's efforts to relocate foreign or extirpated wildlife populations. Agricultural and ranching properties are especially prone to these efforts for they are typically characterized by high ecologic and environmental values. To a greater extent, however, such burdens inure anytime a government intentionally seeks to revoke settled property expectations to facilitate public programs without compensation.

The tule elk relocation program which is the subject of this action is not unique. In 1990, an elk management program calling for the introduction of elk from out of state was instituted in several western counties in Texas. Because the ranch land surrounding the relocation site was privately

owned, strong opposition was voiced. Fears of grazing competition, inadequate health testing for brucellosis, a bacterial disease that causes cattle to abort their fetuses, and damage to privately owned fences and watering facilities were cited in opposition to the plan. Ultimately, the controversial program was terminated before any elk were released because the program director was forced to resign. Similar issues are expected to resurface again soon in Texas with the planned introduction of the desert bighorn sheep.

Efforts to reintroduce the grey wolf to Yellowstone Park met with similar resistance. Ranchers owning land adjacent to the park feared that the predatory wolves would harm sheep and other livestock. Similar fears have also delayed the reintroduction of the Mexican wolf to Arizona, New Mexico, and Texas.

Through such programs, property owners, without their consent and without compensation, are increasingly compelled to absorb physical property losses measurable in productivity, physical damage and predation. However, an even greater and more fundamental loss occurs when states subvert the constitutional mandates of the Fifth and Fourteenth Amendments by redefining what had been established expectations. While the wisdom of such wildlife efforts might be fairly debated, this Court has clearly stated that the constitutional obligations arising therefrom must be met.

SUMMARY OF ARGUMENT

Amici assert that the institutional value of property remains viable only when property rights are clearly established and afforded their just constitutional protections pursuant to the Fifth and Fourteenth Amendments. This principle has been repeatedly affirmed by this Court. The

institutional value of property rests in an owner's reasonable investment backed expectations. However, those expectations are said to be taken when the government action either fails to substantially advance a legitimate state interest or denies an owner the economically viable use of his land without compensation. ***See Nollan v. California Coastal Commission***, 483 U.S. 825, 834 (1987); ***Agins v. City of Tiburon***, 447 U.S. 255, 260 (1980).

Takings analysis considers the character of the governmental action, the economic impact of the action, and the extent to which the action interfered with the owner's reasonable investment backed expectations. ***See Penn Central Transportation Co. v. New York***, 438 U.S. 104, 124 (1978). Amici respectfully ask this Court to grant Mr. Moerman's petition for writ of certiorari to clarify categorical taking theory and to address the Fifth and Fourteenth Amendment federal issues arising from California's knowing interference with Mr. Moerman's reasonable investment backed expectations by implementing a state program dependent upon the nonconsensual usurpation of private resources for its success.

REASONS FOR GRANTING THE WRIT

Rule 10.1(c) specifies that review on certiorari is warranted "[w]hen a state court ... has decided an important question of federal law which has not been, but should be, settled by this Court." United States Supreme Court Rule 10.1(c). Amici accordingly urge this Court to grant the petition to provide needed clarification of how constitutional protections afforded by the Fifth and Fourteenth Amendments are to be applied when a property owner is denied legal recognition of his reasonable investment backed expectations.

The issues raised by this case are not unique to petitioner and the State of California. Increasingly in this era of environmental righteousness, well intentioned regulatory efforts to manipulate biodiversity are burdening rural and agricultural landowners, already voluntary stewards of open space and other valuable environmental resources. The constitutional and just allocation of the costs and burdens accordingly inflicted by government is a significant legal issue best resolved by this Court.

ARGUMENT

I

AT THE TIME OF PURCHASE, MR. MOERMAN'S REASONABLE EXPECTATIONS DID NOT CONSIDER THE COSTS ATTRIBUTABLE TO THE SUBSEQUENT PRESENCE OF WILDLIFE

Property may be said to be a collection of expectations. Though not constitutionally created, property is constitutionally protected. "[W]e are mindful of the basic axiom that '"[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" ***Ruckelshaus v. Monsanto Co.***, 467 U.S. 986, 1001 (1984). With this understanding, amici seek this Court's review to alleviate the institutional costs inflicted when a state summarily disposes of existing property expectations.

This Court has said that "the government does not have unlimited power to redefine property rights." ***Loretto v. Teleprompter Manhattan CATV Corp.***, 458 U.S. 419, 439

(1982). ***See also cited therein, Webb's Fabulous Pharmacies, Inc. v. Beckwith***, 449 U.S. 155, 164 (1980) ("a state, by ipse dixit, may not transform private property into public property without compensation"). This petition seeks review to clarify the scope of those proclamations. "[P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." ***Loretto***, 458 U.S. at 436.

The issue raised in this case was specifically reserved by the court in ***Christy v. Hodel***, 857 F.2d 1324 (9th Cir. 1988), ***cert. denied, sub. nom., Christy v. Lujan***, 490 U.S. 1114 (1989). In that case, Christy was compelled to suffer the depredation of 20 of his sheep by grizzly bears protected by the Endangered Species Act (ESA). ***Christy***, 857 F.2d at 1326. Christy claimed an uncompensated regulatory taking of his property because the ESA prevented him from harming the bears to save his sheep. ***Id.*** at 1327.

The District Court rejected Christy's claim, holding that "damage to private property by protected wildlife does not constitute a taking." ***Id.*** at 1328. The United States Court of Appeals for the Ninth Circuit affirmed that District Court decision. ***Id.*** at 1326. However, the court explicitly raised and left unresolved the issue now presented stating:

> "We note that plaintiffs do not contend, and the record does not show, that the federal government physically introduced any bears to the areas near plaintiffs' properties. Whether the government may be held responsible for damage caused by bears or other wild animals that have been relocated by the government, under a theory that such animals are instrumentalities of the government, is a question we do not decide." ***Id.*** at 1335 n.9.

The facts of Moerman now place that undecided and significant issue squarely before the Court.

The California opinion below held that wildlife could not be an instrumentality of the state. While amici support Mr. Moerman's assertion that wildlife can become instrumentalities when physically transplanted with the state's recognition that the animals will be required to utilize private property to survive, the justification for this conclusion is even more compelling. The California court failed to recognize that Mr. Christy did not prevail because his expectations were deemed unreasonable.

Mr. Christy bought and established his ranch knowing that grizzly bears lived in the area. He knew that grizzly bears ate sheep and he knew that grizzly bears were an endangered species afforded protection by the federal government. Mr. Christy's expectations, therefore, reasonably had to consider the presence of the grizzly bear and its predatory impact on his sheep.

Conversely, Mr. Moerman's expectations at the time he purchased the ranch did not include the tule elk. Mr. Moerman bought his ranch intending to raise sheep and cattle. At the time he bought his ranch, tule elk did not exist within 400 miles of his ranch, and he had no reason to expect that they ever would. In contrast to Mr. Christy, Mr. Moerman had no reason to form any expectation that tule elk would become problematic to his ranching operation. The presence of tule elk cannot be said to be a part of Mr. Moerman's reasonable expectations.

Soon after Mr. Moerman's purchase, the California Department of Fish and Game (DF&G) live-captured 95 tule elk and moved them 400 miles from their native range. This reintroduction was authorized by California Fish and Game

Code § 3951. The release site was in the midst of an agricultural and ranching area which was 90% privately owned. AA[1] at 183-84.

DF&G intended that the surrounding private lands be employed as graze for the elk. In part, the Mendocino County Tule Elk Management Plan states not only that "habitat improvements designed specifically for tule elk will have to be carried out with the cooperation and financial support of private landowners," but also that "the Department should encourage landowners to employ sound grazing practices in an effort to provide quality habitat over the long term for the benefit of both livestock and wildlife." AA at 183-84.

Not only did the DF&G plan that the relocated elk would subsist on private irrigated pasture land, DF&G further recognized that tule elk were not compatible with the local agricultural and ranching industry. ***See*** DF&G's Management Plan for the Conservation of Tule Elk (MPCTE) at 11-12 ("elk can compete with livestock for available forage, cause considerable damage to crops [and] frequently damage fences"). ***See also*** RT-2 at 41, where the attorney general stated that the Legislature clearly considered that the elk would move away from the spot of relocation "or that they would cause injury to private property."

Amici accordingly urge this Court to grant the petition to provide needed clarification of how constitutional protections afforded by the Fifth and Fourteenth Amendments

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[1] "AA" refers to the Appellant's Appendix filed in the First District Court of Appeal, Division One. "RT-2" refers to the Reporter's Transcripts in the Superior Court of the State of California in and for the County of Mendocino, Volume II, dated January 14, 1992.

are to be applied when a property owner is denied legal recognition of his reasonable investment backed expectations. In this case, Mr. Moerman's expectations are readily identified to be reasonable and the state's disregard of them is clearly manifest. The issue is thus readily subject to the review of this Court.

II

AMICI URGE THE COURT TO MEASURE THE LEGITIMACY OF CALIFORNIA'S INTEREST IN RELOCATING TULE ELK AT THE EXPENSE OF PROPERTY OWNERS' REASONABLE INVESTMENT BACKED EXPECTATIONS

It is not the intent of amici to challenge either the wisdom of the tule elk management program implemented by the State of California or its authority to loose wildlife on its citizens. It is worthy of note, however, that tule elk are not classified as threatened or endangered by either the California Fish and Game Commission or the United States Department of Interior. While they are considered unique animals and are afforded complete protection by California, there is no indication that the state acted to curtail extinction or that such drastic management efforts were otherwise required to preserve or maintain the species. Thus the character of the governmental action is merely the expression of a state preference and is not an action to protect an important public interest.

On the other hand, tule elk now overrun Mr. Moerman's ranch, causing him losses in excess of $8,000 per year in feed and damage to his pastures and

fences. AA at 96. The ranch's fair market value has decreased by $20,000 to $40,000. AA at 96. ***See also*** AA at 180 (DF&G's concession that the elk are causing significant damages). Succumbing to such losses, Mr. Moerman offered to lease his land to DF&G for the elk, but his offer was rejected. AA at 96.

This Court recently reaffirmed the constitutional principle that private property rights cannot be taken even in the pursuit of desirable and legitimate environmental protection without compensation. ***Lucas v. South Carolina Coastal Council***, 505 U.S. ____, 120 L. Ed. 2d 798, 814-15 (1992). Because wildlife management programs are increasingly prevalent and property owners are being compelled to shoulder the growing costs associated with these programs, this case urgently presents a significant constitutional question of justness and fairness.

It is unfair, unjust, and inequitable for the state to relocate wildlife knowing that proximate property owners will be compelled to pay the costs and incur the damages necessary to assure its continued survival without compensation. Though the Takings Clause is concerned with fairness, justice and equity (***see Armstrong v. United States***, 364 U.S. 40, 49 (1960)), these concepts were disregarded by the court below which focused on only the narrow technical question of whether the elk were instrumentalities of the state.

The California court's decision encourages governments to undertake wildlife relocation and protection programs, fully planning to inflict uncompensated damages to private property. While the relocation of wildlife might be desired, even a legitimate and well-meaning intent cannot insulate the regulatory impact of a program from the Fifth and Fourteenth Amendments. "[T]he Constitution measures a

taking of property not by what a State says, or by what it intends, but by what it ***does***." ***Hughes v. State of Washington,*** 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis in original).

III

CLEARLY ESTABLISHED AND ENFORCEABLE PROPERTY RIGHTS ARE NOT ENVIRONMENTAL OBSTACLES, BUT WILL ALLOW INNOVATIVE MANAGEMENT PROGRAMS TO PROSPER

California's tule elk program depends upon the upsetting of established private expectations in the ownership of property. DF&G knew not only that the elk would subsist on private grazing land, but also that they would compete with livestock and damage crops and fences. To satisfy the public's desire for wildlife, the state arbitrarily imposed such costs on a few private landowners without compensation. The California opinion subsequently validated that regulatory approach.

Amici respectfully urge this Court to consider that allegiance to constitutional principles of property and compensation will do far more for the environment than the erosion of those rights ever could. The reintroduction of

grey wolves to Yellowstone Park mentioned above provides a case in point.[2]

Grey wolves are an endangered species protected by the Endangered Species Act. Certain wildlife organizations sought to reintroduce the wolf to Yellowstone Park to help facilitate its expansion across the Rocky Mountain Front. The recovery plan was approved by the United States Fish and Wildlife Service in August, 1987. The National Park Service had only to complete its environmental impact statement before the wolves were to be introduced. However, the Park Service balked, stating that it would not draft the impact statement until the prolivestock Wyoming congressional delegation backed the plan. Proximate ranchers strongly opposed such efforts, fearing losses to their livestock and ranching operations.

To appease these fears and secure the necessary support, Defenders of Wildlife, a private environmental organization, established Defenders' Wolf Compensation Fund, a private risk compensation pool. Their model was a state-funded program in Minnesota that pays ranchers whose livestock are killed by any of the timber wolves in that state. Because the Wolf Compensation Fund was premised upon the compensable nature of property, the public proponents of the

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[2] ***See*** Blood, Tom, ***Men, Elk, and Wolves***, specifically at 95-105, in Baden and Leal, ***The Yellowstone Primer***, Pacific Research Institute (1990); Defenders of Wildlife, ***Building Economic Incentives into the Endangered Species Act*** (Oct. 1993); Anderson, Terry L., ***Wolves in the Marketplace***, WALL STREET JOURNAL, Western Edition, August 12, 1992, at A-11.

wolf were able to secure approvals and assure the success of the relocation program.

The resulting success of the program is expected to make it a national model. Already the Defender's Wolf Compensation Fund has been implemented as a model for the Mexican Wolf Compensation and Law Enforcement Fund. Fewer than 70 Mexican wolves survive, all in captivity. In 1982 the United States Fish and Wildlife Service approved a recovery plan calling for the reintroduction and establishment of a self-sustaining population of at least 100 animals across Arizona, New Mexico, and Texas. Difficulties in winning agreement on reintroduction sites and limited funding have since delayed the program. The Mexican Fund is another private attempt to mollify the fears of loss which currently jeopardize the Mexican wolf program.

The Defenders' Wolf Compensation Fund was initially developed to pay ranchers market value for all verified livestock losses. This fund quickly raised $100,000 from those private individuals who supported the relocation efforts. By shifting the responsibility for the burdens imposed by the relocation away from the ranchers and onto those who supported the program, the wolf restoration program prospered.

Today, the fund has expanded to compensate farmers not only for any losses caused by the wolves, but also to reward stewardship. It is now believed that because the wolves are viewed as an asset rather than as a liability, the wolves are better received and assured a better chance at survival. On January 27, 1994, the fund for the first time paid a rancher $5,000 for allowing wolves to reproduce and raise pups on his land. Those pups were the first known to den along Montana's Rocky Mountain Front in over 50 years.

The private stewardship secured by the success of such property based models is significant for, according to a 1993 report from the Natural Heritage Data Center Network, fully 50% of the 726 species currently listed as threatened or endangered pursuant to ESA are not found on all federal lands. Consequently, this report concludes, partnerships with "private landowners are needed for the protection of many species." Natural Heritage Data Center Network, The Nature Conservancy, ***Perspectives on Species Imperilment*** 5 (1993).

By combining the compensation program with stewardship rewards, the private market has recognized property rights and responded to afford an alternative to the command and control mandates promoted by the California court decision below. By upholding the enforceability of property, the economic responsibility for the relocation has voluntarily been assumed by relocation proponents. This has significantly assisted with the recovery of the species.

California's precedent discourages such efforts. That court allowed the state simply to take the property necessary to sustain the elk without compensation. Consequently, the ranching and agricultural interests are not willing stewards of the elk. Wildlife remains a liability and not an asset. Because the public's environmental sentiments are increasingly sophisticated, this Court should review this matter to uphold property rights and in turn to promote successful models such as that implemented in Montana.

CONCLUSION

This Court has decreed that private property owners should not be "forc[ed] ... alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." ***Armstrong v. United States***, 364 U.S. at 49. The issue presented is one of basic fairness: Who must bear the costs incurred to derive public benefit when it comes at the expense of intentionally upsetting otherwise reasonable private property expectations?

Whether wildlife becomes an instrumentality of the state sufficient to sustain Fifth and Fourteenth Amendment claims when that wildlife is captured, moved, and unleashed by a state to continually invade and damage private property is an unprecedented but very significant question before this Court. However, harms intentionally inflicted on the sanctity of reasonable property expectations raise an altogether more dangerous and significant issue.

Because such efforts are becoming increasingly commonplace as the public's environmental sensitivities increase, urgent resolution of this issue by this Court is necessary to ensure that the proper constitutional respect for the rights of property owners remains unabridged.

Accordingly, amici respectfully urge this Court to grant the Petition for Writ of Certiorari of Mr. Robin R. Moerman.

DATED: March 8, 1994.

Respectfully submitted,

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